



LEGACY LAW

Protecting the assets in your family tree

## Joint-decision making: some essential reading

In our experience, little or no regard is given to how adults may make decisions together, yet most wills rely on exactly that for an Estate Plan or a Family Trust to be effective.

Jay Hughes talks of “social capital” as the ability to make good joint decisions. In particular, he says “I would start by saying that the reason a family exists is to enhance the lives of its members. When every member is flourishing, the whole system is working. That speaks to purpose and ultimately the first capital — **legacy**. The second capital is **social** or the core practice of the family. Can you make decisions together? When you think about a 150-year journey or 100-year journey, or even a six-week journey, what you find is that you have to be making joint decisions.”

By the time people are looking at the small print about what is required to “officially” make a decision, positions may have been taken, vote-stacking organised, voting blocs secretly agreed – you might as well be in an Australian parliamentary party! I worked for a law firm where two of the Directors were married and I got the sense that most decisions were made over breakfast or even in bed, before “meetings” of the Directors.

It is far better to have a culture where decisions are carefully considered, respectfully debated and where people are won over to a particular decision. We repeatedly tell people that decisions should be made and, only as a last resort, should a vote be taken. But, when lawyers are left controlling a process, they find it easier to offer joint and several, by majority or unanimous as the only options. This can lead to people thinking they have a veto or can rush to announce a decision taken by one person only on a joint and several basis. Rarely the end of the story.

We suggest that first there should be consideration given to which decisions are made by which members of the family. You may not want to give everyone an equal say in the name you choose for your business or you could end up like this:

The name *Boaty McBoatface* was originally proposed in a March 2016 #NameOurShip online poll to name [a] £200 million polar scientific research ship. The name was described as a homage to Hooty McOwlface, an owl named through an "Adopt-a-Bird" programme in 2012 that became popular on the Internet. Although *Boaty McBoatface* was the most popular suggestion in the #NameOurShip poll, the suggestion to use the name for the mothership was not followed. In October 2016, [it was] announced that the ship would be named *Sir David Attenborough*, after the eminent English zoologist and broadcaster, who came fifth in the poll. (from Wikipedia!)

There should be a Court of Appeal for certain decisions and some should be rounded up into a policy (such as distributions policy or employment of family policy) so that a complete overhaul does not happen each year or when a person has a child they want introduced into a family business.

This is a potentially huge issue as much of Australian wealth is held in discretionary trusts which, guess what, have discretion built into their structure. Beneficiaries often underestimate the risk that distributions will not be equal to people on the same level of the family tree.

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You might think common sense always breaks out but you would be wrong! This has led to a lot of discussion in legal circles. If you are a trustee of a discretionary trust, we direct you to the recent case of *Owies v JJE Nominees Pty Ltd* [2022] VSCA 142.

What consideration was given to the needs and situation of the other over-looked beneficiaries? Unfortunately, where there is not much harmony in a family or a culture of open discussion, what is “fair” and what “values” should apply is open for discussion but only at a time when everyone has their own agenda. For strategic reasons, it is usually best not to give reasons for decisions or, if you have to, for them to be reviewed by a specialist trust lawyer.

If a joint decision is impossible after going through an informal but robust process tailored to your family, it may be best to resign or change the decision-makers. Who has the power to do that? Sometimes no-one has that power. In a discretionary trust, the appointor has that power. So, who is the appointor? Usually, it is the executor so we come to a full circle.

This could apply to you. Are you named as an executor or a Power of Attorney or an Enduring Guardian?

What has your experience been to date in making decisions with a sibling? Might their spouse be a “faceless man or woman” exerting influence and indulging a potential conflict of interest?

If you are expected to make joint decisions, it is important to understand what your mandate is so that consensual decisions can be made with a minimum of stress and sometimes quickly.

In NSW, if the executors cannot agree on how to administer an Estate, we have been instructed to issue proceedings. We predicted the result. The Court appoints a neutral administrator in their place and the assets that one side wanted to keep in the family are usually sold on the open market, with little regard for timing or presentation – the perfect example of a fire sale.

In our experience, this does not lead to one case but several, as the loser of the first case wither appeals or seeks another angle to disturb a decision made in a family. Sometimes, no decision is made and consequences flow. There can be much conjecture about what was meant to be done or what a family member said. This dirty laundry is washed very publicly.

In Victoria, the case of *Trani v Trani* [2018] VSC 274 led to numerous cases including a successful claim that a property transfer document was fraudulently signed.

If you are not the appointor of a trust, we direct you to the Western Australian case of *Mercanti v Mercanti* [2016] WASCA 206. After a family dispute, the son Tyrone who was made the appointor of a trust by his parents removed the company controlled by his parents as trustee and appointed a new trustee controlled by his wife. The Court found that was fine.

Trusts are good structures for families but, be careful when you play with fire was what my parents told me!

For more on this, we direct you to chapters 6, 7 and 9 of our book: *Be A Better Ancestor – Build one of the Great Families* (available at <https://www.legacylaw.com.au/shop/be-a-better-ancestor/>).

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